Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

Motown Beverage Company of Ohio,et.al,
Petitioners
v.
Motown Record Company, L.P.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DONALD R. MURPHY,ESQ.
Rockefeller Building, Suite 612
Superior Avenue, N.W.
CLEVELAND, OHIO 44113
(216) 595-1638

90 pp

The question presented for review to this honorable court is whether the Federal Court of Appeals for the Second Circuit's affirmation of the United States District Court for the Southern District of New York granting of a default judgment under rule 37 of the Federal Rules of Civil Procedure despite the lack of any evidence of willful noncompliance or bad faith and despite the absence of any violation of a clearly articulated order (scheduling or pretrial, constituted an abuse of discretion and accordingly is such a departure from the normal procedures that the United States Supreme Court should exercise its supervisory powers and vacate the default judgment.

LIST OF PARTIES IN THE PROCEEDINGS IN THE COURT BELOW

Arthur B. Boyd, Jr.
President and CEO of Motown Beverage Company of Ohio and Towne Club International

Cleveland Brown
North Carolina distributor for Motown Beverage of Ohio

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Civil Procedure

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

Motown Beverage Company of Ohio, et al,
Petitioners,
V
Motown Record Company L.P.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Motown Beverage Company of Ohio, and Arthur B. Boyd, Jr. and Cleveland Brown, the petitioners herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on November 6, 1998.

OPINIONS BELOW

The November 6, 1998 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is case number 97-9612, which was unpublished and is reprinted in the separate appendix to this petition. The prior opinion of the United States District Court for the Southern District of New York, entered November 17, 1997, is case number 96 Civ. 4785, which was unpublished, and is reprinted in the separate appendix to this petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered November 6, 1998. On November 17, 1998, the petitioners filed a motion for rehearing with the suggestion for a rehearing en banc. Thereby tolling the period to file this petition for a writ of certiorari. On January 5, 1999, the Court of Appeals for the Second Circuit denied the petitioners motion for a rehearing. The Jurisdiction of the Court is invoked pursuant to 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Rule 37(b)(2) of the Federal Rules of Civil Procedure, which reads as follows:

Sanctions by Court Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which action is pending may make such orders in regard to the failure as are just, and among others following:

(A) An order that the matters regarding which the order or any other designated facts shall be taken to be established for purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is

obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

STATEMENT OF THE CASE

The principle issue that drives this case is the battle over the petitioners right use the trademark "Motown Beverage." Petitioner, Arthur B. Boyd, Jr., is the president and chief executive officer of petitioner Motown Beverage Company of Ohio. In 1989,Mr. Boyd purchased this minority owned company from a group of ministers whom resided in Detroit, Michigan. The company had been using the name Motown Beverage since its inception in the mid 1980's. Mr. Boyd, an Afro-American, purchased the company with the belief that it would generate a substantial amount of income and accordingly provide employment opportunities in impoverished areas in the City of Cleveland. It is well known by the national and even international community that the widespread public use of the name "Motown" as a nickname for the City of Detroit (a/k/a the Motor City) was established well before the respondents use of the name. In fact, a vast number of businesses, many in Michigan and around the country, use the word "Motown" as a part of their trade or service marks.

In 1993, the petitioners filed an application with the Trademark and Patent office seeking to register their mark with said office. The Trademark and Patent office, after researching their databanks, concluded via a letter to the petitioners that they did not see why the mark did not belong to the petitioners (See appendix). The

Trademark and Patent Office pursuant to it rules, published the petitioners' application in the Official Gazette. The respondents, who had filed an intent to use application in 1992 for "Motown" in connection with, cafeterias, cafes, cocktail lounge and etc., then filed a notice of opposition to the petitioners application with the Trademark and Patent office eight months after the application had been published in the Gazette. The petitioners' application is currently pending in the trademark office due to the respondents' attempts to usurp the Trademark's authority and avoid an unfavorable decision by their filing of lawsuit in federal court.

In June of 1996 the respondent filed a trademark infringement suit against the petitioners in the United States District Court for the Southern District of New York. They made many claims in their suit, all of which were vehemently opposed by the petitioners in their answer. The Court, however, never adjudicated the issues. The District Court, based upon unsupported findings, claimed that the petitioners supposed noncompliance with discovery orders was nothing more than tactics used to delay the litigation.

The District Court only issued three pretrial orders requiring compliance by the Court. The petitioners abided by each order issued by the Court. The initial order was dated September 25, 1996. The Court directed the petitioner, Motown Beverage Company of Ohio, to retain counsel to represent it because New

York law requires corporations to be represented by a licensed attorney. Petitioner, Mr. Boyd, had responded to the complaint by filing a motion to dismiss for lack of personal jurisdiction. The Court, advised petitioners, even at this early stage, that their failure to retain counsel and have counsel file a notice of appearance by October 23, 1996 could result in a default judgment.

On October 23, 1996, Kenneth Ramseur, filed a notice of appearance on behalf of the petitioners. Subsequent to that filing, the petitioners filed an answer to the complaint with counterclaims, which the respondents responded to on December 2, 1996. Approximately two weeks later, the respondent was served responses to their interrogatories and document demands.

The Court issued another order on January 7, 1997, during a hearing with petitioners substitute counsel. Petitioners and their old counsel, Mr. Ramseur, had extinguished their client-attorney relationship due to monetary and legal strategy differences. Petitioners were given thirty days to retain new counsel. Moreover, the Court itself indicates that the petitioners were not behaving in a dilatory manner by stating "Nobody's laying blame" and "without placing blame at anyone's door, the time has come."

On February 6, 1997, within the Court's time frame, Charles Knull, filed a notice of appearance on behalf of the petitioners. The respondents

admitted that the remaining discovery responses were received on February 5, 1997. The respondents conducted depositions with Reverend Nathaniel Crump on May 15, 1997 in Detroit, Michigan, the founder of Motown Beverage and Cleveland Brown on May 22, 1997 in Norfolk, Virginia. On June 19, 1997 the respondents then served its first notice of deposition of petitioner Mr. Boyd for July 9, 1997. Mr. Knull, in a letter to Mr. Boyd, advised him that the July 9, 1997 date would not be feasible because of his obligation to serve jury duty. Prior to their ability to schedule another date, Mr. Knull's services were terminated. The docket is devoid of any discovery problems between the January 7, 1997 and the final August 6, 1997 order.

The Court mandated in its August 6, 1997, that the petitioner, Arthur B. Boyd, Jr. appear for a deposition in the month of August and to comply with all outstanding discovery requests by August 29, 1997. The petitioner, Mr. Boyd, appeared and participated in a deposition conducted by respondent's counsel on August 29, 1997. Mr. Boyd appeared at 1:00 p.m. after driving over 1,000 miles from Kansas City, Missouri. Mr. Boyd had just completed a week of preparatory medical licensing classes and then two days of taking the actual medical examination. The petitioners counsel was not present, however, respondent's counsel was so aware of his inability to be present well before the deposition. Mr. Boyd was compelled to leave the deposition

twice in order to avoid receiving a ticket at the parking meter. Mr. Boyd was subjected to an eight-hour deposition. During the course of the deposition certain questions were asked and Mr. Boyd called the Court to determine whether he was obligated to answer. The Court refused to intervene at that time.

The petitioners, according to the counsel, in his statement in opposition to the respondents motion for default judgment, indicated that the respondents had all of their discovery requests, including documents that they did not request until after it conducted the deposition with Mr. Boyd.

On November 17, 1997, the Court, struck the petitioners answer and accordingly entered a default judgment against the petitioners. Furthermore, the Court permanently enjoined the petitioners from using the name "Motown."

REASONS FOR GRANTING THE WRIT

Certiorari should be granted where the procedures in the lower court are such a departure from the normal procedures that the United States Supreme Court should exercise its supervisory powers.

The record in this case is devoid of any evidence of willful or bad faith noncompliance with court orders. This Court has held that a litigant should only receive a sanction as severe as dismissal or default judgment under a rule 37(b) order when it is shown that instances of noncompliance were characterized as willful, bad faith or other such culpable misconduct by the litigant. **National Hockey League v. Metropolitan Hockey Club Inc.,** 427 U.S. 639, 640 (1976). The Second Circuit Court of Appeals neglected to follow its own precedents which firstly held that even under an abuse of discretion standard of review, a rule 37(b) sanction will be reversed where the district court's finding of willful noncompliance is belied by the record. **Luft v. Crown Publishers, Inc.**, 906 F.2d 862, 866 (2d Cir. 1990). Secondly, the court held in **Daval Steel Products v. MIV Talendine**, 951 F.2d 1357,1363 (2d Cir. 1991), that provided that there is a clearly articulated order of the court requiring specified discovery, the district court has authority to impose Rule 37(b) sanctions for noncompliance with that order.

The District Court and the Court of Appeals overlooked the facts established in this case, which clearly demonstrate that the petitioners faithfully complied with all of the district courts orders. As stated infra in the statement of the case, there were only three court orders issued by the district order.

The statement of facts and the appendix, which lists the September 1996 Court order, outline the courts directions to the petitioners. The docket established for the case sub judice, clearly shows compliance with the courts September order where an attorney entered a notice of appearance on behalf of the petitioners per the Court order and in a timely manner. The notice was not entered a day, a week or a month after the October 23, 1998 deadline. Thus, stating that there was a delay in acting upon this order or the fact that there was noncompliance would be an obviously incorrect conclusion. The District court and the Second Circuit Court of Appeals, notwithstanding the above facts sought to improperly accept the latter conclusion.

The second order, January 7, 1997, which is reprinted in the appendix, demonstrates that the Court was cognizant that the petitioners were not attempting to delay the proceedings. The petitioner, Mr. Boyd, exclaimed during the hearing that " I in no way want to delay, to do any delays." The Court then responded " Nobody's laying blame." The Court later requires the petitioner to respond to

interrogatories and outstanding discovery requests by February 7, 1997.

By January 31, 1997, the petitioners were advised by their new counsel, Charles Knull, that discovery was nearly completed. Furthermore, there were no communications to the Court by the respondents indicating that the petitioners had not complied with the Court order. Thus, there was also compliance with the January 7, 1997 order.

Prior to the District Court's August 6, 1997 order, there were no intrangincies brought to the Court's attention by the respondent. In fact, the respondents conducted depositions with two key witnesses for the petitioners during this period. *See, infra, statement of facts.* On August 6, 1997, the court ordered, the petitioner, Mr. Boyd, to appear for a deposition in August and to comply with all outstanding discovery requests. The petitioners, just as they had done the previous two times, complied with court orders. The petitioner, Mr. Boyd, participated in a deposition held in New York on August 29, 1997. Again, this date is not a day, a week or a month after the deadline imposed by the Court's August 6 1997 order. Additionally, the petitioners prior counsel, Stephen Woods, stated in the petitioners Statement in Opposition to a Motion for Default Judgment stated that the respondent had received all of the requested discovery documents. (See appendix). Thus, again demonstrating compliance with the court order.

The latter acts more than amply depict a more than compliant litigant. There is a lack of any viable information that could reasonably depict the petitioners conduct as uncooperative and dilatory. The petitioners instead had complied with the Court orders and their compliance unjustly yielded a sanction of default judgment. This clearly shows a clear deviation from normal court procedures. The granting of the default judgment and the affirmation by the Court of Appeals of said judgment creates the impression that Second Circuit litigants who appropriately respond to Court orders in a timely manner should face dismissal of their complaints in the same manner that those who respond in an untimely manner and those fail to respond at all.

The Court of Appeals deviated from its normal procedures when it failed to, as stated infra, in ***Daval Steel Products***, find that the petitioners had violated a clearly articulated order by the Court requiring specified discovery. The Court, in their August 6, 1997, order required all discovery to be completed by August 29, 1997. The petitioners' attorney had stated in a court document that all of the requested discovery documents had been sent to the respondent. Furthermore, in the respondent's Motion for Default Judgment it stated that it had sufficient information to move for a summary judgment in light of the Court's denial of the default judgment. The respondent cannot logically state that it has not received the requested

information in this litigation and has been prejudiced thereby, and simultaneously claim that it has enough information to move for summary judgment. As this Honorable Court is well aware, a litigant who moves for a summary judgment states that after gathering all of the relevant information there are no material issues to be decided. Thus, all of the information the moving party needs and the Court needs has been discovered and the Court can thereby make a decision.

The District Court also deviated from the normal procedure where there was an uncanny resemblance between the Court's findings of facts and conclusions of law and the respondent's Motion for Default Judgment. (See appendix). In fact, the District Court's findings are a paragraph by paragraph, verbatim copy of the respondent's motion. This act, just as the other above actions by the Courts, create the impression that the Courts are not deciphering, analyzing, and fairly adjudicating arguments, which have a profound impact on the viability of litigants who are sued by multi-million dollar plaintiffs.

Additionally, the Court of Appeals failed to apply this Court's rule iterated in ***National Hockey League***, when it failed to find that there had been willful noncompliance, or bad faith, or other culpable conduct, which necessitated the harshest sanction of default judgment. The Court of appeals summary order is devoid of any discussion of willful noncompliance, bad faith or other culpable conduct.

Moreover, the District Court fails to discuss the latter the presence of the latter three elements in its findings of fact and conclusions of law. Instead, there is evidence to the contrary, which actually shows an extraordinary effort on the part of the petitioners to comply with the Court orders.

The petitioners were all non-residents of the forum state New York. The petitioner, Mr. Boyd, was required to appear for a deposition in New York after taking medical licensing exams in Kansas City, Missouri the day prior to the deposition. Mr. Boyd traveled by way of car from Kansas City to New York in order to comply with the Court's order. The petitioner then participated in an eight-hour deposition. He answered well over a thousand questions during the deposition. The District Court and the respondent claimed that the petitioner failed to answer question after question. This logically cannot be true, where the deposition lasted for eight hours. No reasonable attorney who would conduct an eight-hour deposition with a depose who refuses to answer question after question. Mr. Boyd was required to travel to New York, despite the fact that the respondent's counsel actually traveled to the other deposes' respective cities to depose them.

In light of the totality of the circumstances the respondents failed to demonstrate that there was a willful noncompliance, bad faith and other culpable conduct to warrant a sanction

as drastic as a default judgment. The petitioners abided by the court orders, the respondents received all of the requested information prior to the Courts granting of the default judgment and the respondents have stated that they could have moved for summary judgment if the district court had denied its motion for default judgment. Again the district court and the Court of Appeals for the Second Circuit have created the image of a Court system that will not balance the rights and liberties of all individuals who come before it. Instead they appear as institutions which, despite the valiant compliance with its rules and regulations, allow the more powerful and wealthier litigant the ability to wrongfully sway the court into adopting its version of the facts, irrespective of the record. This Honorable Court, however, because of its supervisory power established by the Constitution, a document of the people and for the people, may intervene and admonish the lower courts and mandate that they permit justice to be served.

The petitioners also believe that the district court and the court of appeals have failed to follow proper procedure where the district court neglected to consider lesser sanctions than default judgment. The court in the latter three cases neglected to dismiss the case until after lesser sanctions had been imposed. **Phipps v. Blakeney**, 8 F.3d 788 (11th Cir. 1993); **Prince v. Poulos**, 876 F.2d 30 (5th Cir 1989); and **Thomas v. Geber Productions**, 703 F.2d 353 (9th Cir. 1983). In

Hathcock v. Navistar International Corporation, 53 F.3d 36 (4th Cir. 1995), just as in the case sub judice, there was no attempt to even impose lesser sanctions and the court deemed that conduct and abuse of discretion. Furthermore, a constant factor in determining whether a District Court has properly asserted a default judgment is whether lesser sanctions were considered. *See* **In re Exxon Valdez**, 102 F.3d 329 (9th Cir. 1996); **Bass v. Jostens, Inc.**, 71 F.3d 237 (6th Cir. 1995); **Archibeque v. Atchison, Topeka and Santa Fe Ry. Co.**, 70 F.3d 1172, (10th Cir. 1995); and **Mobley v. McCormick**, 40 F.3d 337 (10 Cir. 1994).

The district court never considered lesser sanctions in this matter. In fact, each of the district court orders stated that the petitioners' failure to abide by said orders could result in a default judgment. According to the court in **Stafford v. Mesnik**, 63 F.3d 1445 (7th Cir. 1995), a default judgment should not be considered a ready response to all litigant misbehavior.

The petitioners were not given the opportunity to pay fines for failing to abide by the Court orders. Nor were they ever given an order by the Court, limiting certain discovery, because of their perceived dilatory conduct and noncompliance. These sanctions would have punished the petitioners for the past perceived conduct and deterred any similar future conduct. The petitioners, however, at the time in which they had completed their obligations to the respondent and

sought to gain valuable discovery information from the respondent was unjustly precluded from exercising its due process rights to defend itself in the district court.

CONCLUSION

The petitioners have conducted themselves in the same manner that thousands of litigants across this democratic country have when they are made the subjects of a civil suit. They did not purposefully nor willfully attempt to delay the proceedings. In fact, the respondents have enough information to proceed to trial, the petitioners, however, were never given the opportunity to perform discovery. Their due process rights were summarily severed by the unsupported default judgment granted by the district court and affirmed by the Court of Appeals. Petitioners respectfully request this Honorable Court to intervene on its behalf and thereby restore credibility and trust to a district and circuit court which has been severely tarnished in the eyes of the Afro-American community.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted by:

DONALD R. MURPHY
Attorney for Petitioners

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing Writ of Certiorari was delivered by certified U.S. Mail to Kenneth L. Bressler, Kalow Springut & Bressler, LLP 488 Madison Avenue, New York, New York 10022 on the 5th day of April, 1999

By: _____
DONALD R. MURPHY

Towne Club International of Ohio, Inc.
D/b/a Motown Beverage of Ohio

22462 Westchester Road
Shaker Heights, Ohio 44122
Office: (216) 991-6604
Fax: (216) 662-0514

September 3, 1996

Judge Preska.
United States District Court
Southern District Court of New York
Foley Square
New York, NY 10007

Dear Judge Preska:

This letter comes after conversation with the pro se office in the Southern District of New York, on Friday August 30, 1996. The law clerk of your office referred me to the Pro Se office.

I was informed by the Pro Se office that Town Club International, Inc. , (TCI) a.k.a. Motown Beverage Company according to the laws of New York has to have an attorney.

At present TCI a.k.a Motown Beverage Company is looking for an attorney, and request time from the court to accomplish that.

Sincerely,

/s/Arthur B. Boyd

Towne Club International, Inc., a.k.a Motown Beverage Company shall have until October 23, 1996 to retain counsel and for counsel to file a notice of appearance. Failure to do so may result in entry of a default judgment.

Mr. Boyd's request to file a motion to dismiss on behalf of the corporation is denied. So ordered September 25, 1996

/s/ Loretta Preska

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOTOWN RECORD COMPANY,
Plaintiff,

V.

MOTOWN BEVERAGE COMPANY,

Defendant.

Before:

KENNETH L. BRESSLER
Attorneys for Plaintiff

KENNETH E. RAMSEUR
Attorney for Defendant

96 Civ-4785 (LAP

January 7, 1997

HON. LORETTA A. PRESKA,

APPEARANCES

District Judge

SOUTHERN DISTRICT REPORTERS (212) 805-0300

(Case called)

THE COURT: Prior to our going on the record counsel, Mr. Boyd and I were having a conversation with respect to Mr. Bressler's December 17 letter and Mr. Ramseur's December 20 letter, both of which were filed for the record. The gist of the conversation is that after **many months of inaction by defendants,** including failure to file an answer and failure to respond to two outstanding discovery requests, Mr. Ramseur now, as reflected in his letter, is asking to be relieved stating that his clients have not been cooperating with him.

By endorsement dated December 23, 1996, I ordered defendants to show cause today why a default judgment should not be entered against them for failure to comply with discovery requests. Although an answer has been served and filed, there has been no compliance with discovery requests. Mr. Ramseur wishes to be relieved, and Mr. Mahler, who was kind enough to be present here today, is not in a position to state that he will represent defendants since he has not yet been retained.

In discussing what should happen next, Mr. Bressler suggested that the delay in moving the case forward was working to his client's detriment in that defendants continued to use the name which plaintiff alleges infringes on its name. I had just recently asked Mr. Boyd

whether or not the defendant could continued to use the name, and he and Mr. Mahler conferred, and now I go back to Mr. Boyd for an answer to the question, sir.

MR. BOYD:
In response, Judge Preska, first of

all, thank you for the privilege of being able to say a few words here today in court. I, at this point, am not manufacturing nor distributing any of my Motown beverage products. There may be a few cases in a warehouse, but we have not made them for two years. The reason for that is my major distributor is not manufacturing and distributing the product because of the cease and desist order received from Attorney Kenneth Bressler, representing Motown Records. That was my 4th or 3rd distributor, and none of my other deals went through,and we are not able to make any more products. I don't know which attorney, but they called my attorney out in Ohio and informed them they would be suing me. And they have refused to make any further product5at this time; and, financially,it is not there.

THE COURT: Just so I am clear, even though you are not manufacturing or distributing product any longer, other than stray cases of product that might be out there,are you otherwise using the Motown name?

MR. BOYD: I'm a little nervous.
THE COURT: Take your time, sir.
MR. BOYD: I'm very uncomfortable in the

courtroom. I guess the question is if I'm marketing and trying to sell the product, et cetera.

THE COURT: Just so you know where my question is going, if you are not using the name anymore, maybe you folks don't have a real dispute anymore.

MR. BOYD: We have a dispute.

THE COURT: That's all I want to know. Okay. That was the gist of the question.

You understand your obligation as a litigant in this Court to respond to proper discovery requests?

MR. BOYD: Yes, sir.

THE COURT: You have to do it, or I will enter judgment against you. Do you understand that?

MR. BOYD: Yes.

THE COURT: All right. Is there any reason why Mr. Ramseur should not be permitted to withdraw?

MR. BOYD: Judge Preska, I've known Attorney Ramseur for 30 years. We were freshmen together in Florida many years ago, and we hadn't talked in 20 years. And I called him, as he said, in desperation. I did instruct him, as I had tried to do, to file a motion to dismiss based on the lack of jurisdiction because I had not sold any beverages or tried to sell any beverages in the State of New York. The subpoena and the summons were served improperly. I did not receive them. And we had to go on with the

answers and interrogatories, but I thought that matter had to be resolved by the Court first because it was a procedural matter.

Now, if he wanted out, he could have just asked me and I would have done that. Okay? I have no desire at all to abuse the system. I have not used any delay tactics. I explained to him in writing what my problems were. If he said he wanted to be out of the case, that would have been a very easy matter to do. And I think what has happened is that my posture has been prejudiced before the Court as being a dishonest and an unethical man.

THE COURT: The only problem that we have is that you haven't responded to proper discovery requests by the other side for many months. That is the only problem we have.

MR. BOYD: Okay.

THE COURT: But my question is, do you object to Mr. Ramseur's being relieved as counsel?

MR. BOYD: No, I do not.

THE COURT: You are relieved, sir.

You also understand, Mr. Boyd, do you not, that a corporation must appear through counsel. A corporation cannot appear pro se; although individuals may, a corporation may not. Do you understand, sir?

MR. BOYD: I finally got that message.

THE COURT: Loud and clear, I hope.

MR. B0YD: Judge, I do have a problem. I really want to retain the firm that I am with today. How do I want to say that? **I in no way want to delay, to do any delays.** I want to go through with it, and we'll discuss it when we leave here, I guess, but I didn't create this problem.

THE COURT: **Nobody's laying blame**. Here is the problem: The problem is the case was commenced in June of 1996. Mr. Bressler, as one would expect, through professional courtesy extended various extensions of time to your counsel. The problem is, nothing has happened, and it is time and this has gone on for too long.

Here is what I am going to do. You must respond to the outstanding discovery requests within 30 days of today. If you do not, a default judgment will be entered against you. This is the last opportunity. You have to do it now. There has been a great deal of delay, and without placing blame at anyone's door, the time has come.

Three days, gentlemen. Any questions?

MR. BRESSLER: What do we do, your Honor, about his retaining counsel? What type of time period do you think appropriate?

THE COURT: He can retain counsel any time he wants as long as the interrogatories and outstanding discovery requests are responded to within 30 days. Counsel

can be retained the day before, but they have to be served on Mr. Bressler 30 days from today.

Do we understand each other? Mr. Boyd, any questions? Any questions, sir?

MR. BOYD: No, your Honor.

MR. **MAHLER:** I'll pass on Mr. Boyd was concerned about how he goes about now implementing his jurisdictional defenses. I'm in a very good position to fully address the problem. I have not seen the full file on this matter and I understand there was an answer. Mr. Bressler has represented that the answer does not contain a jurisdictional defendant. Again, I haven't seen that answer myself. And I know there was a pro se motion for lack of jurisdiction at the very outset, and I'm not aware of any disposition of that motion.

THE COURT: You want to know the best thing about my job? I don't get to give legal advice. You folks discuss it on however you think is the proper way to proceed; but, we must move the case forward. This is the last opportunity. Thirty days or default judgment. Anything else?

MR. BRESSLER: Thank you, your Honor.

MR. RAMSEUR: Thank you, your Honor.

(Adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOTOWN RECORD COMPANY, L.P.

Plaintiff,

-against

MOTOWN BEVERAGE COMPANY OF
OHIO
a/k/a TOWNE CLUB INTERNATIONAL,
ARTHUR B. BOYD, JR., and
CLEVELAND BROWN,

Defendants.
---------- x

96 Civ. 4785 (LAP)

ORDER

LORETTA A. PRESKA, United States District Judge:

This action was filed on or about June 25, 1996. Defendant Boyd advised the Court on or about September 24, 1996 that he was seeking an attorney for the company, and it was ordered that Motown Beverage had until October 23 to retain counsel. Motown Beverage was warned that failure to do so might result in a default judgment against the company. On or about October 23, 1996, Kenneth Ramseur, Esq. filed a notice of appearance on behalf of defendants. Approximately two months later, on or about December 23, 1996, Mr. Ramseur asked to be relieved as counsel on the ground that, inter alia, Mr. Boyd was not communicating with him in a timely fashion. On or about December 23, 1996, defendants were ordered to show cause on January 7, 1997 why a default judgment should not be entered against them for failure to comply with their discovery obligations.

On January 7, 1997, the Court wag informed that Peter Mahler, Esq. might be retained as substitute counsel for Mr.Ramseur, who was relieved at that time. It was ordered that defendant respond to all outstanding discovery requests by February 7 or a default judgment would be entered against them Charles Knull, Esq. entered a notice of appearance on February 11, 1997 on behalf of defendants.

On or about July 14, 1997, Mr. Knull asked to be relieved as defendants' counsel for various reasons that can be summarized as Mr. Boyd's lack of cooperation, and at or about the same time, Kim D. Ashby, Esq. advised that she was in the process of being retained by Mr.-Boyd to represent defendants. By order dated July 31, 1997, Mr. Knull was relieved, and Ms. Ashby substituted. By letter dated August 4, 1997, Ms. Ashby informed the Court that she has not been retained by defendants due to Mr. Boyd's lack of cooperation, and, accordingly, she is relieved as counsel.

In light of defendants' failure to respond to discovery requests and continued refusal to work with counsel in this action, it is hereby ordered that unless (1) Mr. Boyd appears f or his deposition (which shall continue from day to day until complete) at the office of plaintiff's counsel in New York on a mutually agreeable date during the month of August, and (2) defendants comply with all other outstanding discovery requests from plaintiff f no later than August 29, 1997, a default judgment will be entered against defendants. Counsel for plaintiff shall inform the Court no later than September 8, 1997 as to whether or not defendants have complied with the above order. If they have not, plaintiff's counsel shall present a proposed default judgment.

SO ORDERED

August 6,1997

/s/LORETTA A. PRESKA, U.S.D.J.

Stephen K. Woods (SW0253)
Law Office of Stephen K. Woods
156 South Broadway
Cassopolis, MI 49031
(800) 727-0529
Attorneys for The defendants

UNITTED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOTOWN RECORD COMPANY. L. P,

Plaintiff,

v.

MOTOWN BEVERAGE COMPANY OF OHIO a/k/a TOWNE CLUB INTERNATIONAL ARTHUR B. BOYD, JR., and CLEVELAND BROWN,

Defendants.

96 Civ. 4785 (LAP)

DECLARATION OF STEPHEN K. WOODS
IN ORPOSITION OF PLAINTIFFS MQTION FOR A I)EFAULT JUDGMENT

COME NOW, the defendants Motown Beverage Company of Ohio, Dr. Arthur B. *Boyd*

Jr., et a[., by their attorney, Stephen K. Woods, who hereby respond and oppose Plaintiffs motion

pursuant to Rule 37 of the Federal Rules of *Civil* Procedure for a Default Judgments as follows..

1. The Defendants respond to the Plaintiffs allegations that Defendants' "numerous transgressions and out right refusal" to comply with Plaintiffs discovery requests and characterizesuch allegations as blatant and unfounded efforts on its part to compound and confuse the Court

and obtain a default judgment through its obfuscation of the issues and its request for the imposition of inappropriate sanctions. The Defendants have not moved to delay the Court, but rather wish to comply and move this proceeding along swiftly and judiciously.

2. Upon correspondence of Plaintiffs counsel to this Court, Defendant Boyd was ordered to appear for his deposition at the offices of Kalow, Springut & Bressler. Plaintiff is aware and has been aware since the answer was filed in this matter that Defendants are not residents of the State of New York and, indeed, are residents of the States of Ohio and Virginia.

3. Despite being aware of these facts, the Plaintiff forced the Defendants for their depositions in New York City. Plaintiff did not offer to expand any money contribute in any fashion to the transportation expenses of the Defendants to New York City, and Defendant Boyd complied with Your Honors Order and was deposed by Plaintiffs counsel, on August 29, 1997.

4. Defendants have denied throughout the course of this matter that they have not infringed upon any trademark of the Plaintiff, but that rather the Defendants have first use of the Motowm mark for the food and beverage category ***and have*** documented continuous use, which precludes Plaintiffs use of its trademark in this category; and therefore, should have not been forced to expend extraordinary sums of money and endure extreme hardship to travel to and from New York City, but did so as ordered.

Defendant Extraordinary Efforts To Comply With Honorable Loretta A Preka's Court Order, Dated August 6, 199 7

5. Defendants! response to Plaintiffs. motion informs this Honorable Cour that Defendant Boyd went through extraordinary circumstances and over came great obstacles to comply with the Court's Order and be present at *the* deposition held at the offices of Kalow, Springut & Bressler on August 29, 1997, in New York City. Defendant Boyd, as this Court is aware of, attended a month long intensive medical licensing course in Kansas City, Missouri, from July 28August 25, 1997. The course consisted of seven days a week study and testing. At the end of this intensive and vigorous curriculum, Defendant Boyd then took a two day medical licensing examination from August 26-27, 1997. After Defendant Boyd completed the examination, he drove back to Kansas City, slept for a few hours then drove over one thousand and two hundred (1,200) miles from Kansas City to New York City to attend the deposition. Dr. Boyd drove this distance over a time period of approximately 29 hours. Dr. Boyd slept a *total of* three hours from the time of leaving Kansas City to arriving in New York City for the deposition. The three hour test period only occurred when Dr. Boyd's ear over heated, and he had to stop. Immediately upon Defendant Boyd's arrival in New York City, the Defendant still without benefit of rest or sleep, proceeded to be deposed by Plaintiffs counsel, Kenneth Bressler. Esq. for nearly eight consecutive hours.

6. It does not strain the Court or the Plaintiff 's credibility of the Defendants to appreciate the fact that Defendant Boyd went to extraordinary lengths to specifically comply with Your Honor's Order so that he would be present at the Plaintiffs scheduled deposition

Plainfiff Counsels' Ad Hominem Attacks Upon Defendant's Integrity And Character Are Improper And Unethical

7. The Plaintiff through their Attorney Kenneth L. Dressier has attempted to sway judgment by attacking defendant's character, honesty, and integrity, which is not the subject of this matter and should not be subject of the motion presently before the Coourt in an attempt to obtain a default judgment against Defendants. With regard to Plaintiff counsel's first deliberate attack upon Dr. Boyd's credibility, the facts of this case have nothing to do with his Mum to pass a medical exam as stated in his motion. Secondly, Defendant Boyd has never disputed that he entered into a plea of no contest to a bribery charge in 1985 in Lansing, Michigan and that the record was expunged in 1993. Attorney Bressler by continuously referring to a matter that has been expunged bylaw at Defendant Boyd's deposition engaged in conduct that was argumentative, and aimed at badgering the deponent rather than seeking the truth, and cannot, now, argue that the Defendant failed to comply *with the* Courts Order, given the Defendants' responses in light of Plaintiff counsel's conduct and particularly since this was a matter of public record. (Boyd dep. tr. 16-18) With respect to Plaintiffs counsel to third attack upon Defendant Boyd's credibility, Defendant Boyd submits that in October 1995 he was the recipient of worldwide press radio and television coverage. The slanderous and defamatory stories accused Dr. Boyd, a trauma surgeon, of practicing without a license and falsifying a license number. None of which Defendant Boyd asserts arc true, and which is presently the subject matter of litigation. No Criminal and/or civil charges were ever lodged against Dr. Boyd in this regard. Again, the Plaintiff through its attorney seeks to confuse the Court.

8. Upon careful review of the motion submitted by Plaintiff, this Honorable Court will agree that the substance of Plaintiffs motion is speculative, argumentative, irrelevant, dogmatic, erroneous and even slanderous, and does not pertain to the merits *of* this motion. The Court will also recognize that(much of the argument contained in Plaintiffs motion for default judgment are actually excerpts of other materials and documents that are totally irrelevant to the deposition of Defendant or the substance *of motion* before the Court.

9. A quantitative analysis of Plaintiff counsel's declaration will show that only 3 out of 20 pages, in fact, pertain to the subject matter of the deposition. A cursory examination and reading of Plaintiffs motion shows that this is more of an effort to influence the Court against the Defendant in a derogatory and scurrilous manner rather than address the substantive merits of its motion. This submission to the Court is more of an attack upon Dr. Boyd rather than a motion for default judgment based on Defendants failure to comply, and as the Court is aware, this is not Plaintiff counsel's first such attack on- Dr. Boyd, such attacks are improper and unethical and Plaintiffs conduct should be sanctioned by this Court.

No Showing of the Defendant's Failure To comply With Honorable Lorettai Preska's Court Order, Dated August 6, 1997, Requiring Defendant Boyd To Re Deposed by Plaintiff's Counsel.

10. As previously set forth herein, Defendants endured great hardship and expense to comply with the Courts Order and be present at the deposition held at the offices of Kalow, Springut & Bressler on August 29, 1997, in New York City.

11. Defendant's counsel was not in attendance at the deposition because of prior scheduling conflicts and advised Plaintiffs counsel of these circumstances. Defendants counsel did, however, speak to Dr. Boyd -and Plaintiffs counsel via telephone prior to the commencement or the deposition and advised the parties that he would be available by telephone if needed. , Accordingly, Plaintiffs counsel proceeded with the deposition of Dr. Boyd for over eight hours. Plaintiff's counsel should not now be allowed to argue and object that Plaintiffs counsel was not present and failed to comply with Your Honors Orders in light of the foregoing set of facts.

12.Contrary to Plaintiff counsel's allegations, Defendants' counsel never at any time provided Dr. Boyd with *'stock objections'* to be used for purposes of obstructing the deposition. Furthermore, Plaintiff'ss counsel never contacted me in this regard although I was available. If he seriously felt that Dr. Boyd was obstructing the deposition at the time, several options were available to him. He did not, however, avail himself of any of those alternatives, but rather seeks a default judgment.

13.Dr- Boyd used his discretion and best judgement, given the circumstances, in responding to Plaintiff counsel's contentious and argumentative style of questioning. Where under the circumstances Defendant deemed it appropriate for him, the deponent, to Object Or to refuse to answer arguably objectionable deposition questions, he did in good faith- However, for Plaintiff's counsel to now contend that Dr. Boyd obstructed the deposition after having sat though his questioning for over eight consecutive hours is incredulous.

14. Defendants' counsel submits to the Court that Attorney Bressler's proper course of action was to attempt 10 resolve in good faith the matter without judicial intervention with opposing counsel. Plaintiffs counsel has not attempted or exhausted any reasonable or good faith efforts to secure the responses he complains of, but rather seeks the imposition of a totally inappropriate sanction, a default judgment,

15. Defendants' counsel is prepared to assist the Court and Plaintiff's counsel in providing written answers to questions counsel contends he obtained inadequate responses to in connection there, with during the deposition.

16.Defendants' counsel reasonably believes that all documents requested by Plaintiff have been provided, including tax returns for Motown Beverage for the period 1989-92, which have been forwarded to Plaintiffs counsel under separate cover.

C .clusion

17. Plaintiffs counsel by its motion is attempting to obtain a defaultt judgment that is unwarranted and insupportable under the facts. The Defendants have attempted to comply with the Court and cooperate in good faith in the adjudication of this matter in all respects.

18. Furthermore, Defendants request that the Court deny Plaintiffs motion For default judgment, deem the bearing scheduled for September 19, 1997 unnecessary, direct Plaintiffs counsel to exhaust in good faith all other remedies available to counsel in obtaining responses to

specific questions complained of and any other instruction that Your Honor deems proper in

assisting the parties in resolving these issues.

19. Pursuant to 28 U.S.C. 1746, 1 declare under penalty and perjury that the foregoing is

true and correct.

Dated- September 13, 1997

/s/ Stephen K. Woods (SWO253)

Kenneth L. Bressler (KB 3389)
Kalow, Springut & Bressler
380 Lexington Avenue
New York, NY 10168
(212) 972-6600
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOTOWN RECORD COMPANY, L.P.,

Plaintiff,

V.

MOTOWN BEVERAGE COMPANY OF OHIO a/k/a TOWNE CLUB INTERNATIONAL, ARTHUR B. BOYD, JR., and CLEVELAND BROWN,

Defendants.

96 Civ. 4785 (LAP)

DECLARATION OF KENNETH L. BRESSLER
IN SUPPORT OF PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT

1. I am a member of the firm of Kalow, Springut & Bressler, attorneys for Plaintiff Motown Record Company LP and submit this Declaration in support of Plaintiff s motion pursuant to Rule 37 of the Federal Rules of Civil Procedure for a Default Judgment. I am fully familiar with the facts set forth herein.
2. Prior to setting forth for the Court the numerous transgressions by Defendants and their outright refusal to comply with the Court's Orders requiring them to comply with discovery requests, I will set forth for the Court's convenience and a brief description of the parties and the

issues underlying this case. With this background, Defendants' motive for delay becomes clear: Defendants cannot muster any facts supporting their case -- they are irrefutably infringing and diluting Plaintiff s famous MOTOWN trademark.'

Plaintiff Motown Record Company LP

3. Plaintiff Motown is a California Limited Partnership with its principal place of business at 825 Eighth Avenue, New York, New York 10019. (Complaint, par.2) Plaintiff, which has been operating under the MOTOWN mark since 1960, is, according to Defendant Boyd, "the most widely recognizable [trademark] throughout the world ... [i]n connection with music and entertainment." (Ex. I at 6; Boyd dep., page 144, lines 13-16) Motown's catalogue of artists includes and has included Michael Jackson, Diana Ross and Stevie Wonder. (Complaint, par. 8) As expected of a world-renowned entertainment company, Plaintiff has expanded the use of its famous MOTOWN mark beyond phonograph records, cassettes and compact discs. The MOTOWN mark has been and is used in conjunction with diverse goods and services, including restaurants and clothing. (Complaint par. 8)

4. Plaintiff is the owner of numerous federally registered trademarks incorporated MOTOWN mark, including:

TRADE-	**REG.**	REG.	**FIRST**	
MARK	**N-G,**	DA	ITISR	**GOAM**
MOTOWN	800,977	12/28/65	4/60	Phonograph
records				

Plaintiff is prepared to submit formal summary judgment papers if appropriate.

2

MOTOWN records, and Design	985,972	6/11/74	4/60	Phonograph tapes and cassettes
MOTOWN records, and Design	985,976	6/11/74	4/60	Phonograph tapes and cassettes
MOTOWN tapes, cassettes, and Design and audio video devices in the form of cassettes, disks and cartridges	1,075,409	10/18/77	12/64	Records, cartridges reproducing tapes,
MOTOWN popular musical	881,471	11/25/69	10/66	Providing entertainment
MOTOWN pants, hats, caps, jackets,	1,829,466	4/5/94	1973	Shirts, and shorts
MOTOWN services - production shows	1,102,357	9/12/78	3/77	Entertainment of television
MOTORTOWN REVUE	1,687,331	5/12/92	8/90	

Entertainment services in the nature of packaged theatrical attractions

MOTOWN services in the nature REVUE theatrical attractions	1,730,413	11/3/92	4/92	Entertainment of packaged
MOTOWN services in the nature REVUE and theatrical	1,766,298	4/20/93	4192	Entertainment of live music presentations

MOJAZZ	1,917,167	9/5/95	9/92	Pre-recorded audio and video tapes, compact discs, records and other sound apparatus; namely, , tapes, featuring music; and glasses cases
MOJAZZ	1,885,656	3/21/95	9/92	Entertainment services in the nature of a musical group, band performance services, dinner theater, production of radio and television programs, and organizing

MOTOWN MASTER SERIES and Design

1,851,323 8/30/94 11/92

MOTOWN 2,040,824 9/30/92 9/95

community festivals, featuring a variety of activities; namely, musical performances

Musical and theatrical sound and video recordings; phonograph records, compact discs, digital audio tapes, prerecorded audio cassettes and video and audio tapes all featuring music and theatrical entertainment

Cafes, cafeterias, canteens, cocktail lounge services, nightclubs, restaurants, self service restaurants, snack bars, and videotaping services

5. Plaintiffs registration No. 2,040,824 for the MOTOWN mark for cafes, cafeterias,canteens, cocktail lounge services, nightclubs, restaurants, self service restaurants, snack bars,and videotaping services was filed as an Intent-to-use application and gives Plaintiff priority of use dating back to the date of filing-September 30, 1992. (15 U.S.C. § 1057(c))
6. Plaintiff is also the owner of the following allowed Intent-to-use applications:

TRADEMARK SER, NO. MING DATE GOOD

MOBEER

MOBEER

741432,7349/1/93

74/431,8059/1/93

Bar services, dinner theater services, snack bars, banquet and social function facilities for special occasions, cabarets, cafes, canteen services, carry-out restaurants, catering, restaurants, night clubs,

cocktail lounges, and retail food store services and retail clothing store services

Footwear, tee-shirts, pants, shorts, sweatshirts, jackets, shirts,

bandannas, scarves, caps, visors, hats and headbands

Defendant Motown Beverage Company

7. Defendant Motown Beverage Company was founded and named in 1986 by Reverend Nathaniel Crump. (Crump dep. tr. 12) Reverend Crump is a musician whose childhood was greatly influenced by Plaintiff Motown. (Crump dep. tr. p. 44)

8. Crump knew that Motown was famous and hoped to benefit from its fame. (Crump dep. tr. 24) One of Crump's goals was to have the family of Berry Gordy (the founder of Motown Record Company) donate to him the Motown Building in downtown Detroit for Crump to tear down and use to build a beverage bottling plant. By doing so, Crump hoped to revitalize the MOTOWN name in Detroit, which Crump testified lost luster in Detroit after the Plaintiff Motown Record Company moved to Los Angeles. (Crump dep. tr. 23,86)

9. Crump claims that representatives of his company were given the right to use the name Motown by Gladys Gordy, purportedly one of Berry Gordy's sisters, as long as he did not attempt to register the Motown mark as a trademark. (Crump dep. tr. 16-18; See Ex. 2) The 66agreement" was not in writing and Crump is not aware as to whether or not "Gladys Gordy" even worked for Motown Record Company. (Crump dep. tr. 87) In fact, I have been informed by Motown Record Company that Berry Gordy does not have a sister named Gladys Gordy and that no such person ever worked for Motown Record Company.

10. From 1988 to 1993 when Motown Beverage was sold to Defendant Boyd, there was no beverage produced under the name Motown Beverage and from 1989, when Crump ran out of inventory, to 1993, there were no sales of beverage under the name Motown Beverage. (Crump dep. tr. 74-75)

Defendant Arthur Boyd

11. Defendant Arthur Boyd became a distributor for Motown Beverage in 1988 and bought the company from Crump in June 1993. (Crump dep. tr. 9-10) Boyd sold $16,547 of soda bearing the Motown mark in 1989. (Ex. 3 at 475) Boyd has produced no documents evidencing sales in 1990, 1991 or 1992. In 1993-1995 Motown Beverage reported to the I.R.S. sales of $70,641, $76,83 1, and $2,500 respectively, and reported having spent $250 per year on advertising. (Ex. 4) Nevertheless, Boyd, in documents sent to Plaintiff as well as this Court, claims that his company is worth $50 million. (Ex. 5 and 6)

12. Boyd's lack of credibility is apparent from such misrepresentations as well as from his background. Boyd, after having failed the medical licensing examination eleven times, was convicted of Felony bribery charges in Michigan for attempting to bribe a state official with $20,000 for an advanced copy of the exam. (Ex.7) He then gave a false license number to the University of Maryland Medical System, and proceeded to practice medicine without a,license until caught in 1995 and fired. (Ex.8) As a show of incredible gumption, Boyd lists the University of Maryland Medical System on his resume. (Ex. 9) Boyd's misrepresentations also run rampant throughout this case, having misrepresented to Cleveland Brown (see below) that he was in possession of a written agreement with Plaintiff permitting him to use the MOTOWN

mark. (Brown dep. tr.53-5)

Brown: [I]t was just constant lies all the time.

Q: From Boyd?

Brown: Yeah. I mean constant, you know. And I just tried to tell the man, you know, let's do this thing legit... (Brown dep. tr. 47)

Defendant Cleveland Brown

13. In 1990 Cleveland Brown received 20 cases of beverage bearing the Motown mark which he sold in one of his convenience stores in Norfolk, Virginia. Brown did not receive any other Motown Beverage soda until 1993. (Brown dep. tr. 50)

14. Prior to distributing Motown Beverage, Brown, repeatedly asked Boyd to confirm that he had the right to use the Motown trademark. Boyd told Brown that he had a written agreement from Motown Record Company giving him the right, but never produced a copy to Brown, indicating that the agreement was in a safe deposit box and was too valuable to take out. (Brown dep. tr. 22, 36, 44, 53-61) If not for Boyd's false representations, Brown would not have tried to distribute Motown beverage. (Brown dep. tr. 6 1)

15. In the short time that Brown distributed Motown Beverage he was asked by consumers on at least five occasions whether Motown Beverage was a Motown Record Company product, and was asked by the larger stores he tried to sell Motown Beverage to if he was affiliated with Plaintiff. (Brown dep. tr. 20; 172-3)

16. On September 7, 1993 (33 years after Plaintiff began using the MOTOWN mark and one year after Plaintiff Motown Record company filed an Intent-to-use application for Motown for cafes, etc), Brown filed a trademark application for the MOTOWN mark for carbonated soft drinks and low calorie carbonated soft drinks, and informed the trademark office that his first use of the name was July 23, 1993.' (Ex. 10) Brown both signed an abandonment of his trademark application and assigned the application to Boyd after Motown Record Company sent him a cease and desist letter. (Ex. 11)' Brown filed for personal bankruptcy in 1996 and thus was dropped as a defendant in this case.

The Complaint

17. This case was commenced by Motown Record Company on June 25, 1996. The Complaint, which names Motown Beverage Company of Ohio a/k/a Towne Club International, Arthur B. Boyd Jr. and Cleveland Brown, seeks damages and to enjoin Defendants from infiinging and diluting Plaintiffs famous MOTOWN mark. Specifically, Plaintiff seeks relief under (i) 15 U.S.C. § 1114 for infringement of its registered MOTOWN marks, (ii) Section 43(a) of the Lanham Act, 15 U.S.C. §§ 1125(a) for false designation of origin, (iii) 15 U.S.C. 1125(c) and § 368-d of the New York General Business Law for dilution of its famous MOTOWN marks, (iv) common law trademark infringement, and (v) unfair competition.

2 Plaintiffs registration for Motown for cafes, etc. has priority over this use pursuant to U.S.C. § 1057(c).

Brown's application is the subject of an opposition proceeding brought by Plaintiff Motown Record Company, which proceeding has been suspended pending the outcome of this case.

Defendants'History of Delay

18. Defendants initially appeared pro se through defendant Boyd. On July 11, 1996, Boyd made his first attempt to delay a resolution of this matter by filing a baseless motion to dismiss for lack of personal jurisdiction and venue.

19. **On July 15, 1996, Plaintiff served interrogatories and discovery** requests on Defendants. Defendant Boyd informed me that he would not be complying and on August 15, 1996 Plaintiff filed a cross-motion to compel.

20.I informed Boyd that he would have to retain counsel to represent the corporate defendant. Boyd refused.

21. On August 15, 1996, Plaintiff opposed the motion to dismiss by submitting evidence of Boyd's soliciting sales of infringing product in this district! Boyd did not submit further papers in response to the evidence submitted by Plaintiff. Instead, after being presented with unequivocal evidence establishing jurisdiction, Defendant's then counsel, Kenneth Ramseur, Esq., filed an answer that did not raise lack of personal jurisdiction or venue as an affirmative defense.

22. On September 25, 1996, this Court Ordered the corporate defendant to appear. In addition, Boyd attempted to enter into a distribution agreement covering New York City. When asked at his deposition where the proposed distributor, who Boyd spoke to within the last couple of months, could now be found, he refused to answer. (Boyd dep. tr. p. 120)

through counsel by October 23, 1996. According to the September 25 Order, "Failure to do so

may result in entry of a default judgment." (Ex. 12)

23. On October 23, 1996, I was contacted by Kenneth Ramseur, Esq., who was
retained to represent Defendants. Mr. Ramseur indicated that Defendants would not bereplying to Plaintiffs opposition to the motion to dismiss, but instead, would be filing ananswer and asked for an extension until November 11, 1996.

24. On November 11, 1996, Mr. Ramseur indicated that his clients were not being cooperative, and that he was thus not in a position to file an answer. Another extension toanswer was granted, this time to November 15, 1996 and Mr. Ramseur agreed that he would respond to outstanding discovery by December 16, 1996.

25. On December 15, 1996, Defendants' counsel provided me with a draft of incomplete responses to discovery containing blanks to be filled in, having informed me that his clients were again causing delay by refusing to review his draft responses.

26. On December 20, 1996, Mr. Ramseur wrote to this Court seeking to withdraw and indicating that he had "reached the conclusion that Dr. Boyd's failure to cooperate with me is part of a strategy, on his part to cause delay in these proceedings." (Ex. 14)

27. On December 23, 1996, Your Honor ordered Defendants to show cause on January 7, 1997 why a default judgment should not be entered for failure to comply with discovery requests.

28. At the January 7, 1997 hearing, Your Honor permitted Mr. Ramseur to withdraw, Ordered Defendants to retain new counsel, respond to discovery requests within 30 days and warned Defendant Boyd, who was present at the hearing, that failure to retain counsel and timely comply with discovery demands would result in a default. Peter Mahlerv, Esq. informally appeared at the hearing, spoke on Defendants' behalf and informed the court that he was speaking to Boyd about being retained as substitute counsel.

29. Defendants' instead retained Charles Knull, Esq. as counsel. Mr. Knull appeared and served discovery responses on or about February 5, 1997.

30. Beginning in April 1997, 1 repeatedly asked Mr. Knull for dates that would be convenient for his client to appear, as well as dates that would be convenient for non-party witness depositions.

31. Mr. Knull informed me that Boyd refused to give him dates to be deposed and on June 19, 1997, 1 served a notice of deposition calling for Boyd to appear on July 9, 1997. (Ex. 15)

32. On June 27, 1997, Mr. Knull informed me that his client would not appear for the

deposition as noticed. I informed Mr. Knull that if his client did not appear and did not provided alternative dates in the near future that I would have no choice but to seek a default judgement.

33. On July 8, 1997, Mr. Knull informed me that Boyd would not be available until "sometime in September" because he claimed to be studying to take medical licensing exams.

34. Despite claiming to be unavailable to be deposed on July 9, Boyd was in New York at least on July 10- 11 meeting with Mr. Knull, retaining new counsel and setting up and attending a meeting at my office.

35. On July 11, 1997, almost one year after I informed Boyd that he needed to retain counsel, Mr. **Knull** sought to be removed as counsel, citing Boyd's lack of cooperation and differences of opinion as to the merits of counterclaims Boyd wanted to file. (Ex. *16)*

36. By Order dated July 31, 1997, Mr. Knull was relieved as counsel and Kim Ashby, Esq. was substituted as counsel. The July 31, 1997 Order also required Defendant Boyd to "appear for his deposition (which shall continue from day to day until complete) at the office of Plaintiff's counsel in New York on a mututally agreeable date during the month of August" and ordered Defendants to "comply with all other outstanding discovery requests from plaintiff no later than August 29, 1997. " The order further provided, "Failure to comply with the above may result in sanctions, including entry of a default judgment against defendants." (Ex. 12

37. On August 4, 1997, Ms. Ashby sought to be relieved as counsel, also citing Boyd's lack of cooperation. (Ex. IS) On August 6, 1997, this Court relieved Ms. Ashby as counsel and Ordered that unless Boyd appeared for his deposition and Defendants complied with outstanding discovery no later than August 29, 1997, "a default judgment *will be* entered against defendants." (Ex. 18) (emphasis added)

Defendants'Failure to Comply with this Court's August 6 Order

38. On August 13, 1997, Stephen K. Woods, Esq. filed a notice of appearance. Boyd's deposition was scheduled to commence on August 29, 1997 at 9:00am, the earliest day he was available due to his taking medical licensing exams. (Boyd dep. tr.24-26) Boyd did not arrive until after 1:00pm and proceeded to interrupt the deposition every 1/2hour to leave the office, walk several blocks and put quarters in the parking meter, all of which took 1/2hour. Finally, I offered to pay for Boyd's garage out of my own pocket to stop the interruptions. (Boyd dep. tr. 22,23,46,47)

39. Boyd, who was noticed both individually and as a representative of Defendant Motown Beverage Company, was not represented by counsel as required by this Court's Order of September 25, 1996. (Ex. 12) Instead, Boyd acted as his own **counsel. He consistently -referred to a -page of** stock objections such as "the document speaks for itself" Attorney-client privilege," and "irrelevant" supplied to him by his new attorney.

40. In addition, Boyd has not produced all documents requested by plaintiff, including tzx returns for Motown Beverage for the period 1989-92 (Boyd dep. Tr 217), checks written on the account of Motown Beverage(Boyd dep. Tr 250-1), and documents evidencing sales during the period 1990-93 (Boyd dep. Tr 252-3). Indeed, Boyd appears to have intended to willfully withheld relevant documents, as evidenced by the following testimony:

Mr. Boyd: Pardon me for being so direct again. You [Mr. Bressler] had to have been in my house.

You're not typing that, are you? You know why? Because this is a document that I pulled out of a
That I had that I pulled out of a "How to buy and sell your business," at the Shaker library. And then
What I did is, I carried this to the typist and said type this up. I want to look at different kinds of ways And talk to friends of mine, of how I can negotiate this thing, cause I don't want to fight this thing with them. I want to work out something. We can negotiate, once they find out what this thing is really worth. That is whatthis is about. And this wasn't anything you were supposed to have, unless I gave it to Briscoe.

41. It is clear that Defendants are doing everything in their power to delay a resolution of this matter, including failing to comply with this Court' s Orders. A default judgment is clearly appropriate.

42. This motion is brought by Order to Show Cause as directed by the Hon. Loretta A Preska. No prior relief has been made for the relief sought herein.

43. Pursuaant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 4, 1997

By: /s/ Kenneth. Bressler (KB3389)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOTOWN RECORD COMPANY, L.P

Plaintiff,

-against

MOTOWN BEVERAGE COMPANY OF OHIO a/k/a TOWNE CLUB INTERNATIONAL, ARTHUR B. BOYD, JR., and CLEVELAND BROWN,

Defendants

96 Civ. 4785 (LAP)

FINDINGS OF FACT

AND CONCLUSIONS OF

LORETTA A. PRESKA, United States District Judge:
Plaintiff Motown Record Company LP

1. Plaintiff Motown is a California Limited Partnership with its principal place of business at 825 Eighth Avenue, New York, New York 10019. (Complaint, 1 2). Plaintiff, which has been operating under the MOTOWN mark since 1960, is, Defendant Boyd admits, "the most widely recognizable (trademark] throughout the world . . . [i]n connection with music and entertainment." (Boyd Dep., p. 144, lines 13-16). Motown's catalogue of artists includes and has included Michael Jackson, Diana Ross and Stevie Wonder. (Complaint, 1 8). Plaintiff has expanded the use of its famous MOTOWN mark beyond phonograph records, cassettes and compact discs. The *MOTOWN* mark has been and is used in conjunction with diverse goods and services, including restaurants and clothing. (complaint, I B).

2. Plaintiff is the owner of numerous federally registered trademarks incorporating the MOTOWN mark, including

registration No. 2,040,824 for the MOTOWN mark for cafes, cafeterias, canteens, cocktail lounge services, nightclubs, restaurants, self-service restaurants, snack bars, and videotaping services, which was filed as an Intent-to-use application and gives plaintiff priority of use back to the date of filing -- September 30, 1992. (15 U.S.C. S 1057(c)). Defendant Motown Beverage_Company

3. Defendant Motown Beverage Company was founded and named in 1986 by Reverend Nathaniel Crump. (Crump Dep., p. 12). Reverend Crump is a musician whose childhood was greatly influenced by plaintiff Motown. (Crump Dep., p. 44).

4. Crump knew that Motown was famous and hoped to benefit from its fame. (Crump Dep., p. 24). One of Crump's goals was to have the family of Berry Gordy (the founder of Motown Record Company) donate to him the Motown Building in downtown Detroit for Crump to tear down and use to build a beverage bottling plant. By doing so, Crump hoped to revitalize the MOTOWN name in Detroit, which Crump testified lost luster in Detroit after the plaintiff Motown Record Company moved to Los Angeles. (Crump Dep., pp. 23, 86).

5. From 1988 to 1993 when Motown Beverage was sold to defendant Boyd, there was no beverage produced under the name Motown Beverage, and from 1989, when Crump ran out of inventory, to 1993, there were no sales of beverage under the name Motown Beverage. (Crump Dep., pp. 74-75).

Defendant Arthur Boyd

6. Defendant Arthur Boyd became a distributor for Motown Beverage in 1988 and bought the company from Crump in June1993. (Crump Dep., pp. 9-10). Boyd sold $16,547 of soda bearing the Motown mark in 1989. Boyd has produced no documents *evidencing sales in* 1990, 1991 or 1992. *In* 1993-1995, Motown Beverage reported to the I.R.S. sales of $70,641, $76,831 and $2,500, respectively, and reported having spent $250 per year on advertising.

The Complaint

7. This case was commenced by Motown Record Company on June 25, 1996. The complaint, which names Motown Beverage Company of Ohio a/k/a Towne Club International, Arthur B. Boyd, Jr. and Cleveland Brown, seeks damages and to enjoin defendants from *infringing and* diluting plaintiff's famous MOTOWN mark. Specifically, plaintiff seeks relief under (1) 15 U.S.C. S 1114 for infringement of its registered MOTOWN marks, (ii) Section 43(a) of the Lanham Act, 15 U.S.C. *SS* 1125(a) for false designation of origin, (iii) 15 U.S.C. *S* 1125(c) and 5 368-d of the New York General Business Law for dilution of its famous MOTOWN marks, (iv) common law trademark infringement, and (v) unfair competition.

Defendant's History of-Delay in This Actign

8. Defendants initially appeared pro se through defendant Boyd. Mr. Boyd was informed by the Court of the necessity for counsel to appear for the corporate defendant. on July 11, 1996, Boyd filed a motion to dismiss for lack of personal jurisdiction and venue.

9. On July 15, 1996, plaintiff served interrogatories and discovery requests on defendants. Defendant Boyd informed counsel for plaintiff that he did not intend to comply, and on August 15, 1996, plaintiff filed a cross-motion to compel.

10. On August 15, 1996, plaintiff opposed the motion to dismiss by submitting evidence of Boyd's soliciting sales of infringing product in this district. Boyd did not submit further papers in response. Instead, defendants' then-counsel, Kenneth Ramseur, Esq., eventually filed an answer that did not raise lack of personal jurisdiction or venue as an affirmative defense.

11. On September 25, 1996, this Court ordered the corporate defendant to appear through counsel by October 23, 1996. According to the September 25 Order, "Failure to do so may result in entry of a default judgment."

12. On November 11, 1996, Mr. Ramseur informed counsel for plaintiff that his clients were not being cooperative and that he was thus not in a position to file an answer. Another extension to answer was granted, this time to November 15, 1996,

and Mr. Ramseur agreed that defendants would respond to outstanding discovery by December 16, 1996.

13. On December 15, 1996, defendants' counsel served a draft of incomplete responses to discovery containing blanks to be filled in.

14. On December 20, 1996, Mr. Ramseur wrote to this Court seeking to withdraw as defendants' counsel and indicating that he had "reached the conclusion that Dr. Boyd's failure to cooperate with me is part of a strategy on his part to cause delay in these proceedings."

15. On December 23, 1996, defendants were ordered to show cause on January 7, 1997 why a default judgment should not be entered for failure to comply with discovery requests.

16. At the January 7, 1997 hearing, Mr. Ramseur was permitted to withdraw, defendants were ordered to retain new counsel and/or respond to discovery requests within 30 days. Defendant Boyd, who was present at the hearing, was warned that failure to retain counsel and timely comply with discovery demands would result in a default. Peter Mahlerv, Esq. informally appeared at the hearing, spoke on defendants' behalf and informed the Court that he was speaking to Boyd about being retained as substitute counsel.

17. Defendants instead retained Charles Knull, Esq. as counsel. Mr. Knull appeared and served discovery responses on or about February 5, 1997.

18. Beginning in April 1997, counsel for plaintiff repeatedly asked Mr. Knull for dates that would be convenient for his client to appear for deposition as well as for dates that would be convenient for non-party witness depositions.

19. Mr. Knull informed counsel for plaintiff that Boyd refused to give him dates to be deposed, and on June 19, 1997, plaintiff served a notice of deposition calling for Boyd to appear on July 9, 1997.

20. On June 27, 1997, Mr. Knull informed counsel for plaintiff that his client would not appear for the deposition as noticed. Mr. Knull was informed that if his client did not appear and did not provide alternative dates in the near future that plaintiff would have no choice but to seek a default judgment.

21. On July 8, 1997, Mr. Knull informed counsel for plaintiff that Boyd would not be available until "sometime in September" because he stated that he was studying to take medical licensing exams.

22. Despite claiming to be unavailable to be deposed on July 9, Boyd was in New York at least on July 10 and 11 meeting with Mr. Knull, retaining new counsel and setting up and attending a meeting at plaintiff's counsel's office.

23. On July 11, 1997, Mr. Knull sought to be removed as counsel, citing Boyd's lack of cooperation and differences of opinion as to the merits of counterclaims Boyd wanted to file.

24. By Order dated July 31, 1997, Mr. Knull was relieved as counsel and Kim Ashby, Esq. was substituted as counsel. The July 31, 1997 order also required defendant Boyd to "appear for his deposition (which shall continue from day to day until complete) at the office of plaintiff's counsel in New York on a mutually agreeable date during the month of August" and ordered defendants to "comply with all other outstanding discovery requests from plaintiff no later than August 29, 1997." The order further provided, "Failure to comply with the above may result in sanctions, including entry of a default judgment against defendants."

25. On August 4, 1997, Ms. Ashby sought to be relieved as counsel, also citing Boyd's lack of cooperation. On August 6, 1997, this Court relieved Ms. Ashby as counsel and ordered that unless Boyd appeared for his deposition and defendants complied with outstanding discovery no later than August 29, 1997, "a default judgment will be entered against defendants."

Defendants' Failure to c2mRly with this Court's August 6 Order

26. On August 13, 1997, Stephen K. Woods, Esq. filed a notice of appearance. Boyd's deposition was scheduled to commence on August 29, 1997 at 9:00 a.m., the earliest day he was available due to his taking medical licensing exams. Boyd did not arrive until after 1:00 p.m. and proceeded to interrupt the deposition every half hour to leave the office, walk several blocks and put quarters in the parking meter.

27. Boyd, who was noticed both individually and as a representative of defendant Motown Beverage Company, was not represented by counsel as required by this Court's order of September 25, 1996. Instead, Boyd acted as his own counsel. He repeatedly referred to a handwritten page of objections such as "the document speaks for itself," "attorney-client privilege, and "irrelevant."

28. Boyd proceeded to obstruct the deposition by refusing to answer question after question, including questions relating to whether he authored certain relevant documents.

29. In addition, Boyd admitted that he had not produced all documents requested by plaintiff, including tax returns for Motown Beverage for the period 1989-92, checks written on the account of Motown Beverage, and documents evidencing sales during the period 1990-93.

30. As indicated by the above recitation of the history of this action, defendants have been given every opportunity to correct their defaults but have failed to do so for a prolonged period. Plaintiff is prejudiced by its inability to obtain information in discovery and by the delays defendants have caused and continue to cause in moving the action to resolution. In light of the warnings issued to defendants in the past, I find that lesser sanctions would not be effective. Accordingly, because of defendants' failure to comply with outstanding discovery requests and continuing obstructionist

behavior, defendants, answer is stricken, and a default judgment may be entered. See *Johnson v.* M. Melnick & Co., No. 91 Civ. 7961 (LAP), 1996 WL 239994 (S.D.N.Y. May 8, 1996), affld, 104 F.3d 355 (2d Cir. 1996).

SO ORDERED
November 17, 1997

/s/ LORETTA A. PRESKA, U.S.D.J.

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UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT COMMISSIONER FOR TRADMARKS
2000 Crystal Drive
Arlington, Virginia 22202-3513

JAN. 13, 1995

NOTICE OF PUBLICATION UNDER 12(a)

1. Seriai No.: 74/432,885

2. Mark: MOTOWN

3. Applicant Brown, Cleveland

4. Publication Date: FEB. 14, 1995

This mark of the application identified appears to be entitled to registration. The mark will, in accordance *with* Section 12(a) of the Trademark *Act of* 1946, as amended be published in the Official Gazette on the date-indicated above for the purpose of opposition by any person who believes he may be damaged by the registration of the mark. If no opposition is filed within the time specified by Section 13w(a)of the Statute or by rules 2.101 or 2.102 of the Trademark Rules, the Commissioner of Patents and Trademarks may issue a certificate of registration.

Ccpies of the trademark portion of the Official Gazette containing the publication of the mark may be obtained at $16.00 each for domestic orders or at $20.00 each for foreign orders from,

The Superintendent of Documents
US Government Printing Offices
Washington D.C 20402

By direction of the Commissioner.

Proceedings include all events.
1:96cv4785
Motown Record Co. v. Motown Beverage Co., et al
CLOSED

U.S. District Court
Southern District of New York - Civil Database (Foley Square)

CIVIL DOCKET FOR CASE #: 96-CV-4785

Motown Record Co. v. Motown Beverage Co., et al
Assigned to: Judge Loretta A. Preska
Demand: $0,000
Lead Docket: None
Dk-.# in other court: None

Cause: 15:1125 Trademark Infringement (41-Lanham Act)

CLOSED

Filed: 06/25/96

Nature of Suit: 840
Jurisdiction: Federal Question

6/25/96 COMPLAINT Filed; Summons issued and Notice pursuant to 26
U.S.C. 636(c); FILING FEE $ 120.00 RECEIPT # 265596 (ricm)
[Entry date 06/26/961

6/25/96 Rule 9 certificace filed by Motown Record Co. (ricm)
[Entry date 06/26/961

6/25/96 It is suggested that the case be classified as standard.
Magistrate Judge Eaton is so Designated. (ricm)
[Entry date 06/26/961

7/1/96 RETURN OF SERVICE executed as to Arthur B. Boyd Jr. by Personal Service on 7/1/96 (kk) [Entry date 07/18/961

7/16/96 NOTICE OF MOTION by Motown Beverage Co., Ar

BEST AVAIL

Jr., Cleveland Brown to dismiss the complaint [Entry dace 07/17/96]

7/17/96 RETURN' OF SERVICE executed as to Motown Beverage Company Ohio a/k/a Towne Club International by Personal Service, accepted by Arthur B. Boyd, Jr. on 7/1/96 (kk) [Encry date 07/18/96

7/17/96 RETURN OF SERVICE executed as to Cleveland Brown by delivering and leaving with Mrs. Cleveland Brown, wife on 6/26/96 (kk) [Entry date 07/18/96]

9/3/96 NOTICE OF CROSS MOTION by Motown Record Co. for an order compelling deft Arthur B. Boyd to submit to a deposition to take place in NY compelling deft Motown Beverage Co. of Ohio to submit to a Rule 30(b)(6) deposition to take place in NY & compelling defts to provide documents and to answer interrogatories. Return date 9/5/96 59:30. (lam) [Entry date 09/04/96]

Docket as of May 26, 199S 2:10 pm
Page I

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1:96cv4785

9/3/96 MEMORANDUM by Motown Record Co. in OPPOSITION to motion to dismiss **the complaint ; and in SUPPORT of [7-1]** cross motion for **an Order compelling deft Arthur B. Boyd** to submit to a **deposition to take place in NY compelling** deft Motown Beverage Co. of Ohio to submit to a Rule 30(b)(6) to take place in NY & compelling defts to provide documents and to answer interrogatories. (lam) [Entry date 09/04/961

9/3/96 DECLARATION of Traci Jordan, Sr. VP for Motown Cafe, a limited partner of plr-ff Motown Record Co. re soda cans MOT OWN Beverage. (lam) [Entry date 09/04/961

9/3/96 DECLARATION of Kenneth L. Bressler, atty for pltff Motown Record Co. in OPPOSITION to (3-11 motion to dismiss the complaint and in SUPPORT of (7-11 cross motion for an Order compelling deft Arthur B. Boyd to submit to a deposition to take clace in NY compelling deft Motown Beverage Co. of Ohio to submit to a Rule 30(b)(6) to take place in NY & compelling defts to provide documents and to answer interrogatories. (lam)[Entry date 09/04/961

9/30/96 Filed Memo--Endorsement on letter to Judge Preska from Arthur B. Boyd dated 9/3/96, …TOWNE CLUB INTIL., INC.
A.K.A. MOTOWN BEVERAGE CO. SHALL HAVE UNTIL 10/23/96 TO RETAIN COUNSEL AND FOR COUNSEL TO FILE A N APPEARANCE. FAILURE TO DO DO MAY RESULT IN DEF AULT JDGMT. MR. BOYD'S REQUEST TO FILE DISMISS ON BEHALF OF THE CORPORATION IS ORDERED ... time (signed by Judge Loretta Preska) (1s)

10/23/96 NOTICE of attorney appearance for Motown Beverage Co., Arthur S. Doyd Jr. by Kenneth Ramseur (kw)

11/15/96 ANSWER to Complaint by Motown Beverage Co. by attorney Kenneth Ramseur (pl) (Entry date 11/19/961

11/15/96 Rule 9 certificate filed by Motown Beverage Co. (pl)(Entry date 11/19/96)

12/2/96 REPLY by Motown Record Co. to Defendants' Counterclaim (pl)Entry date 12/03/961

1/17/97 Letter filed by Motown Record Co., Kenneth L. Bressler to Judge Preska dated 12/17/96 re seeks the Court's permission to make a motion to compel defendants to comply with discovery, and 9ii) requests a conference with Your honor to sec a schedule for the orderly and timely conduct of the 1itigation. (djc) (Entry date 01/08/97

2/6/97 NOTICE of attorney appearance for Motown Beverage Co. Arthur S. Boyd Jr. by Charles H. Knull. (kg) (Entry date 02/07/97)

Proceedings include all events.
1:90'cv4785 . Motown Record Co. v. Motown Beverage Co., et al

2/6/97 Rule 9 certificate filed by Motown Beverage Co. (Towne ClubIntl of Ohio) (cd) **[Entry** date 02/07/97]

5/14/97 *STIPULATION* and PROTECTIVE ORDER for confidentiality of all information produced by any party as part of discovery in this action. (signed by Magistrate Judge James C.Francis IV). (kg) [Entry date 05/23/97)

8/6/97 ORDER, in light of defendants, failure to respond to discovery requests and continued refusal to work with counsel in this action, it is hereby ordered that unless (1)Mr. Boyd appears for his deposition (which shall continuefrom day to day until complete at the office of plaintiff's counsel in New York on a mutually agreeable date during themonth of Aug., and (2) defendants comply with all other outstanding discovery requests from plaintiff no later than 8/29/97, a default judgment will be entered against defendants. Counsel for plaintiff shall inform the Court no later than 9/8/97 as to whether or not defendants have complied with the above order. If they have not, plaintiff'scounsel shall present a proposed default judgment (signed by Judge Loretta A. Preska); Copies mailed. (ae)[Entry date 08/07/971 [Edit date 08/08/97]

8/6/97 ORDER, substituting Kim Ashby & Associates as attorney for defts in place of Charles H. Knull; terminated attorney Charles H. Knull for Arthur S. Boyd Jr., attorney Charles H. Knull for Motown Beverage Co.; Mr. Boyd shall appear for his deposition (which shall continue from day to day until complete) at the office of pltff's counsel in New York on a mutually agreeable date during the month ofAugust; Defts shall comply with all other

outstandingdiscovery requests from pltff no later than 8/29/97.Failure to comply with the above may result in sanctions,including entry of a default judgment against defts signed by Judge Loretta A. Preska); Copies mailed. (kg) [Entry date 08/07/97]

8/18/97 NOTICE of attorney appearance for Motown Beverage Co., Arthur B. Boyd Jr. by Stephen K. Woods (sac)

9/5/97 ORDER TO SHOW CAUSE by Motown Record Co.; Show Cause Hearing set for 9:00 a.m. on 9/19/97 to determine why a default judgment against Motown Beverage Co., and Arthur B. Boyd Jr. should not be entered (signed by Judge A. Preska); Copies mailed. (kw) (Entry date 09/09/971

9/5/97 DECLARATION of Kenneth L. Bressler in support by Motown Record Co. (23-11 motion to determine why a default judgment against Motown Beverage Co., and Arthur B. Boyd Jr. should not be entered (sac) (Entry date 09/09/97]

Proceedings include all events.
1:96cv4785 Motown Record Co. v. Motown Beverage Co., et al CLOSED

10/6/97 DECLARATION of Stephen K. Woods in opposition by Motown Beverage Co., Arthur B. Boyd Jr. [23-1] motion to determine why a default judgment against Motown Beverage Co., and Arthur B. Boyd Jr. should not be entered (sac)[Entry date 10/07/971(Edit date 10/07/97]

11/18/97 JUDGMENT that defendants and their agents, servants, employees,and attorneys and those persons in active concert or participation with them are permanently enjoined as set forth in this judgment. Defendants, counterclaims are dismissed with prejudice. (signed by Judge Loretta A.Preska); Mailed copies and notice of right to appeal. EOD: 11/19/97 (kw) [Entry date 11/19/97] [Edit date 11/20/97]
11/18/97 Case closed (kw) (Entry date 11/19/97
11/18/97 FINDINGS OF FACT AND CONCLUSIONS OF LAW; because of defts, failure to comply w/ outstanding discovery requests and continuing obstructionist behavior, defts, answer is stricken,and a default jdgmt. may be entered; (signed by Judge Loretta A. Preska)(1s) [Entry date 11/19/971(Edit date 11/21/97)
11/18/97 FINDINGS OF FACT AND CONCLUSIONS OF LAW; because of defts,failure to comply w/ outstanding discovery requests and continuing obstructionist behavior, defts, answer is stricken,and a default jdgmt. may be entered; (signed by Judge Loretta A. Preska); forwarded ori doc. to idgmt. Clerk on 11/19/97 (1s) [Entry date 11/19/97
12/19/97 NOTICE OF APPEAL by Motown Beverage Co., Arthur B. Boyd Jr. from [26-11 judgment order . Copies of notice of appeal mailed to Attorney(s) of Record: Kenneth L. Bressler . $105.00 Appeal filing fee paid on December 19, 1997 on receipt 4 E 304317. (dt)

2/2/98 Notice that the record on appeal has been certified and transmitted to the U.S. Court of

Appeals: [29-11 appeal by Arthur B. Boyd Jr., Motown Beverage Co. On February 2, 1998. (dt)

2/6/98 Transcript of record of proceedings before Judge Preska filed for dates of January 7, 1997 (bm)

3/26/98 Motion to vacate returned to Atty. for deft, as per Judge's request. (see order, doc. #34). (djc) [Entry date 04/01/98
[Edit date 04/15/981

4/6/98 MANDATE OF USCA (certified copy) Re: (29-11 appeal by Arthur R. Boyd Jr., Motown Beverage Co.. ORDERED that the appeal be, and it hereby is dismissed. (97-9612) George Lange, III, Clerk, U.S.C.A. (dt) (Entry date 04/10/98)

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Proceedings include all events.
1:96cv4785 Motown Record Co. v. Motown Beverage Co., et al CLOSED

4/15/98 ORDER; the motion to vacate judgment purs. to Rule 60(b),filed 3/26/98, shall be returned for (1) failure to sign the memorandum of law; and (2) failure of an atty. To appear on behalf of the corporate deft (signed by Judge Loretta A. Preska); Copies mailed (sac)

4/20/98 Filed Memo-Endorsement on letter from Arthur B. Boyd, Jr.,atty for defendant requests that the Court ignore Mr. Bressler's request, thus compelling Mr. Bressler to exercise his legal knowledge and expertise to determine which way to proceed. Construing the above as a motion in light of the April 8, 1998 order, the above motion is denied as moot. (signed by Judge Loretta A. Preska) (djc) [Entry date 04/21/98] (Edit date 04/22/98)

5/13/98 NOTICE OF MOTION by Motown Beverage Co., Arthur B. Boyd Jr., Cleveland Brown for an order pursuant to Rule 60(b)of the FRCP vacating the default judgment; brief in support of the motion is attached. (kw)[Entry date 05/14/981

Docket As of May 26, 1993 2:10 pm

Page 5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL *ESTOPPEL OR* RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of November one thousand nine hundred and ninety-eight.

PRESENT:

Hon. James L. Oakes,

Hon. John M. Walker, Jr.,

Circuit Judges,

Hon. Whitman Knapp,

District Judge.

MOTOWN RECORD COMPjV4Y, L.P.,

21aintiff-Appellee,

_v.

MOTOWN BEVERAGE COMPANY OF OHIO, also known as Towne Club International, ARTHUR B. BOYD. JR., and CLEVELAND BROWN,

Defendants-Appellants.

APPEARING FOR APPELLANTS:

PETER,MAHLER, ESQ.,

The Honorable Whitman Knapp, Senior Judge of the United States District Court for the SourzhEi_.Lr. District of New York, sitting by designation.

Cleveland, OH

APPEARING FOR APPELLEE:

KENNETH L.-BRESSLER, ESQ., Kalow, Springut & Bressler, New York, NY

Appeal from the United States District Court~ for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Preska, J.) and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is AFFIRMED.

Defendants-appellants appeal from the district court's entry of a default judgment against them for failure to comply in a timely fashion with discovery requests and for "continuing obstructionist behavior."

In well documented Findings of Fact and Conclusions of Law filed November 17, 1997, the district court struck defendants' answer and entered a default judgment in plaintiff's favor, citing numerous instances of defendants, failure to comply with various court orders and the resultant delays in litigation. Though the district court did not specify the basis for its action, its citation to Johnson v. M. Melnick & Co., No. 91 Civ. 7961, 1996 WL 239994 (S.D.N.Y. May 8, 1996), aff1d, 104 F.3d 355 (2d Cir. 1996), makes clear that it was relying on its authority pursuant to Fed. R. Civ, P. 16(f) and 37(b)(2)(C). Rule 16(f) states that if an attorney "fails to obey a scheduling or pretrial order," the court is empowered to make an order pursuant to Rule 37(b), which permits, inter

alia, entry of a judgment by default against the disobedient party.

Defendants argue on appeal that (1) the district court abused its discretion in granting plaintiff's motion for a default judgment, and (2) that the district court's failure to rule on defendant Arthur Boyd's motion to dismiss for lack of personal jurisdiction renders the default judgment void as to Boyd.

As to defendants' first contention, we **agree with the** district court that the numerous instances of delay and intransigence in complying with the court's orders warranted the **drastic step** of striking answer and entering default judgment in plaintiff's favor. To the extent that defendants seek to lay blame for the delay at the feet of prior counsel, that effort is

rejected, first because. it is contrary to the record, which amply supports the district court's findings that it was Boyd, himself, who failed to comply with court orders and obstructed discovery, and second because, to the extent that **counsel bore any** responsibility, it is well-settled that **litigants are "legally** responsible for their attorneys' conduct. Davidson v. Keenan, 740 F.2d 129, 133 (2d Cir. 1984).

As to defendants' second contention, we hold that Boyd effectively waive<~ his challenge to personal jurisdiction and venue by filing an answer which did not set forth these defenses, and by failing to press the personal -jurisdiction or venue issue again until after the default judgment was entered. As we have made clear, 'waiver of a challenge to personal jurisdiction may occur due to a party's conduct, as well as its failure to raise the defense in motions or pleadings. See Datskow v. Teledyne, Inc., 899 F.2d 1298, 1302-03 (2d Cir. 1990); see also Yeldell v. Tutt, 913 F.2d 533, 538-39 (8th Cir. 1990). We have no difficulty finding waiver an the facts before us.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:

CAROLYN CLARK CAMPBELL, Clerk By:/s/ Lucille Carr, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for tile Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5th day of January one thousand nine hundred and ninety-nine.

Motown Record Compan

V Dkt No: 97-9612

Motown Beverage Comp

Plaintiff-Appellee

Defendant-Appellant

A petition for rehearing en banc having been filed herein by the appellant Motown Beverage.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

By: /s/ Beth J. Meador,

09-443-3455 .....MCITOVATOR . TORRANCE CA .....

78-166-0584 ..... MOTOVATOR FITNESS SYSTEMS .....

17-748-1785 ..... MOTOVIDEO ..... ON TWO WHEELS
ENTERTAINMENT ..... ALISO VIEJO ... CA-27121 ALISO
CREEK RD ..... SCR

83-325-4485 ..... MOTOVIDLAK TOM CLASSIC
PRINTERS ..... MAPVEYS LAKE... PA ... RR 2
BOX 80 SL

84-5519-2W ..... MOTOWN
NORCROSS ..... GA 5~~TRIANGLE
PKY SL

05-881-5911 ..... MOTOWN AUTOMOTIVE DISTRG CO
..... FARMINGTON Ac:mi:::2
CRESTVIEW Ci:::::::HQ:::::
07-424-8188 ..... MOTOWN AUTCWTIVE DISTRG CO
LIVONIA ..... MI ..... LD

.....6 . . MAIL
ADDRESS
LIVONIA

83 326 318 .....PLACE ..... FLORHAM
PARK.....NJ 88 CATHEDRAL AVE .....
83-131-e954 .....MOTOWN BARBER P. eEAJ)Tl
STYLING .....WARREN ..... OH .....
MARKET ST .....SL
82-687-4216 .....MOTOWN BEAUTY ... SELMA .....
LAUDERDALE ST .....SL
82-92~,-1205 .....MOTOWN BEAUTY SALON
JACKSON .....MS
3349 JAYNE AVE .....SL
17-34Z-1348 .....MOTOWN BEAUTY SUPPLY .....
5TH AVE .....SL

80-695-0630 ..... MOTOWN BMTY SUPPLY ... CHOOHO
ACKO . MADISON ..... WI ..... 1821 S PARK ST . SCR
10-629-2665 ..... MOTOWN BEAUTY SUPPLY . WAR-LEE
INC .. MILWAUKEE WI-5500 W CAPITOL DR HCR

87-933-6873 ... MOTOWN BEVERAGE
.....
VIR61NIA BCH..VA ... 4213 DERBY WHARF DR ..... SL
.....
86-690-W32 ... MOTOWN CAFE CONCEPTS ..... OV
CAFE CONCEPTS INC ..... RED BAW ..... NJ ...
58 RECTOR PL ..... SCR ....
87-852-7290 ... MOTOWN CAFE LLC
..... NEW
YORK ..... NY ... **1790 BROADWAY** FL 8 ..... HQ
.....
80-024-8999...MOTOWN CONEY & DELI RESTAURANT
..... DETROIT ..... MI
... 3242 E JEFFERSON AVE ..... SL .....
17-174-5953 ... MOTOWN ELECTRIC
.....
BARNESVILLE ... GA ... 750 **CANNAFAX** RD ..... SL
.....
79-650-9545..."OTOWN FASTSIGNS INC .....
FASTSIGN ..... FARMINGTON HL.Ml ...
29975 ORCHARD LAKE RD ..... SL .....
8Z-537-4416...MOTOWN GAMES .....
MANDINGO ENTERTAINMENT INC ..... BEVERLY HILLS.CA ...
345 N MAPLE DR STE 373 .... SCR ....
50-819-0995 ... MOTOWN GLOVE 9 SAFETY DIV .....
SAFETY CENTERS INC ..... TAYLOR ..... MI
... 14805 TELEGRAPH RD ..... OCR ....
93-139-4852 ... MOTOWN GLOVER & SAFETY .....
SAFETY CENTERS INC ..... STREA)%"D IL
.....
. LCR ....
82-517--W2 ... MOTOWN HAIR
.....
DETROIT ... ::::**Ml**:::**WW~i~D** RIVER AVE ..... SL .....
80-008-N55 ... MOTOWN HISTORICAL MUSEL" INC .....
DETPOIT .....
MI ... 2648 W GRAND BLVD ..... SL .....
62-224-8664 ... MOTOWN ;NC .....
MO-T(~L~'~66i6*4'~i6i6:.".,*,.,**."NEWARK ..... NJ
... 169 MARKET ST ..... SL .....
61-463-3543 ... MOTOWN INTERNATIONAL TRVL SVC
..... DETROIT .....
MI-13119 W 7 MILE RD ..... SL .....
8e-333-5762 ... MOTOWN MACHINE INC
..... LAMAR
..... Co ... 215 N MAIN ST ..... SL .....

80-937--6163 ... MOTOWN MARKET RADIO OF AUGUSTA.WRXR FM ..... AUGUSTA ..... CA ... 753 BROAD ST STE 14 ..... SL .....
80-024-9W5...MOTOWN HENS WEAR
.....
DETIOIT ..... MI...15400 GRAND RIVER AVE ..... SL .....
15-734-7428 ... MOTOWN V.)TCL .....
MURRAY HILL MOTEL ..... DETROIT ..... MI ... 16221 W 8 MILE RD ..... SCR ....
62-410-9716 ... MOTOWN MUSCLE CAR PARTS
..... ROYAL OAK ..... MI ... 4949 FERNLEE AVE ..... LO .....
62-576-3271 ... MOTOWN PARKING CO
..... W BL.OOMFIELD MI ... 4032 PINEHURST DR ..... SL .....
16-389-5865...MOTOWN PHOTOGRAPHY ....
..... DETROIT ... ::MI ... 16030 W MCNICHOLS RD ..... SL .....
84-939-4382 ... MOTOWN PIZZA MODESTO ... ::..CA ... 207 H ST ..... SL .....
61-793-9343 ... MOTOWN ..... MI ... 5825 HORGER ST ..... SL .....
00-201-W5 ... MOTOWN PORTRAIT PHOT"APflY
..... DETROIT ..... MI ... 19320 LIVERNOIS AVE ..... Ho .....
88-462-6151 ... MOTOWN PORTRAIT PHOTOGRAPHY
..... DETROIT ..... MI ... 19616 VAN DYKE ST ..... OR .....
93-016-4330 ... MOTOWN PRODCTNS INC
..... NEW YORK ..... NY ... 9 W 57TH ST ..... SL .....
93-04,6-1843...MOTOWN REALTY CO
.....
BROOKLYN ..... NY ... 370 LEWIS AVE ..... SL .....
62-389-4649 ... MOTOWN RECORD COMPANY L P .....
MOTOWN RECORDS ..... LOS A14GELES ... CA ... 6255 W SUNSET BLVD OR .....
78-834-7300 ... MOTOWN RECORD COMPANY L P
..... N HOLLYWOOD ... CA ... 11618 MOORPARK ST Wi*MCEIR .....
80-593-1706 ... MOTOWN RECORD COMPANY L P .....
..... DALLAS ..... TX ... 5000 QUORUM OR STE 200 .... BR .....

00-535-0095 ... MOTOWN RECORD COMPANY L P A .....
..... LOS ANGELES ... CA ...
5750 WILSHIRE BLVD ..... Ho .....
87-652-1477-MOTOWN RECORD COMPANY L P A
..... JERSEY CITY ...
NJ ... 330 MONTGOMERY ST ..... BR .....
60-455-1119 ... MOTOWN RECORD COMPANY L P A
..... NEW YORK .....
NY ... 1350 AVENUE OF THE AMERIC.BR .....

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62-389-4649...MOTOWN RECORDS ..... MOTOWN
RECORD COMPANY L ..... LOS ANGELES ... CA ... 6255 W
SUNSET BLVD ..... BCR .... 78-0e4-8556 ... MOTOWN
RECORDS
.....
&ETROIT ..... MI ... 16533 BAYLIS ST ..... LD
..... 80-528-7810...MOTOWN RECORDS DIVISION .....
POLYGRAM RECORD', INC ..... JAMAICA ..... NY
... 80-02 NEW GARDENS RD ..... BCR 62-565-5501
... MOTOWN TRADING
.....
LIVONIA ..... ml ... 29570 W CHICAGO ST ..... SL
..... 62-473-0875 ... MOTOWN VARISTY CLUB
..... DETROIT
..... MI ... 15741 WHITCOMB ST ..... LD .....
61-716-7911 ... MOTORWORKS INC
.....
BROOKLYN ..... NY ... 1833 E NEW YORK AVE ..... SL
.... MAIL AUDRESS BROOKLYN ..... NY ...
P 0 BOX 70726 .....
..... CHALMETTE ..... LA ... 34?9
PARIS RD ..... SL ..... 04-W-6307 ... MOTOYAMA
ENTERPRISES INC ..... OOMASA RESTAURANT
..... LOS &NGELES...CA ... 100 JAPANESE
VILLAGE PLAZ.8R ..... 09-171-1671 ... MOTOYAMA
ENTERPRISES INC ..... OIWAKE RESTAURANT
..... LOS ANGELES ... CA ... 122 JAPANESE
VILLAGE PLAZ.HQ ..... 09-250-4570 ... muTOYAr4A
ENTERPRISES INC ..... OOMASA
..... LOS ANGELES ... CA ... 350
EAST IST ST ..... OR ..... 16-M6-4886 ...

Supreme Court, U.S.
FILED
MAY 6 1999
CLERK

No. 98-1615

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MOTOWN BEVERAGE COMPANY OF OHIO, et al.,

Petitioners,

—v.—

MOTOWN RECORD COMPANY L.P.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Milton Springut
Counsel of Record
KALOW SPRINGUT & BRESSLER
488 Madison Avenue
New York, New York 10022
(212) 813-1600

Attorneys for Respondent

IDP

Counter Statement of Question Presented

Since the Petition of Motown Beverage Company of Ohio, Arthur B. Boyd, Jr. and Cleveland Brown (collectively "Motown Beverage") mischaracterizes the nature of the proceedings below, Respondent Motown Record Company L.P. ("Motown") respectfully restates the question presented as follows:

Whether the Petition should be granted, where (i) there is no split in the Circuits with respect to the Federal Rules of Civil Procedure at issue, (ii) no novel or important questions of law are presented, and (iii) the Petition is no more than a third attempt to challenge the district court's findings, which were amply supported by the record.

Supplemental Statement of the Parties

Pursuant to Rule 29(6), Respondent Motown certifies that it is not a corporation and thus no disclosure is necessary under the Rule.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Summary of Argument

The Petition does not even attempt to explain why this case is worthy of this Court's review. Rather, virtually the entire brief is a reargument of the evidence below. The Petitioners simply disagree with the trial court's and Second Circuit's decisions, and want to reargue their case yet again. This Court has stated that such cases are particularly inappropriate for review.

Counter-Statement of the Case

A. Proceedings in the Trial Court

The Petition is almost entirely devoted to a recitation of 'facts,' or more precisely, allegedly 'correct' inferences that the trial court should have drawn from the record. Respondent instead submits that the opinion of the trial court below contains an accurate and adequate statement of the relevant proceedings before it, and therefore adopts its decision. (Appendix F to the Petition).

As set out in the trial court's decision, from the outset of this case the Petitioners engaged in prolonged and systematic discovery abuses and violations of court orders, and received repeated warnings that a default might be entered if they did not comply with the Federal Rules and the court's orders. Petitioners did not comply, and the trial court, correctly exercising its discretion and correctly applying the law, struck Petitioners' Answer and granted a default judgment.

B. The Appellate Court Decision

The Second Circuit's decision was as straightforward as it was correct. The Second Circuit found no abuse of discretion in the trial court's findings. To the contrary, the appellate court found them "well documented" by the record, and agreed with the district court that the repeated pattern of Motown Beverage's discovery abuses and flouting of orders supported the trial court's striking of their Answer and the entry of a default judgment under Fed. R. Civ. P. 16(f) & 37(b). (Appendix I to the Petition)

Reasons for Denying the Writ

THE APPELLATE COURT'S DECISION WAS AN UNEXCEPTIONAL INTERPRETATION OF THE FEDERAL RULES OF INSUFFICIENT IMPORTANCE TO GRANT REVIEW OF ITS DECISION

The Petition does not demonstrate any inconsistency in the Second Circuit's decision and the precedents of this Court; it does not identify any split among the Circuits supporting this Court's need to set down 'uniform' standards for the application of Fed. R. Civ. P. 16(f) or Fed. R. Civ. P. 37; and aside from an unfounded and offensive statement that this Court should restore the "credibility and trust" of the Southern District of New York and the Second Circuit, "which has been severely tarnished in the eyes of the Afro-American community," (Petition, at 14), the case itself raises no special or important issues of law.

The opposite is true—this case falls squarely within that category of cases that this Court has singled out as inappropriate for its review: "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). *Accord Graver Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) (collecting cases): "[A] court of law, such as this Court is, rather than a court for the correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional error."

A. National Hockey League

Petitioners first argue that the Second Circuit misapplied this Court's decision of *National Hockey League v. Metropolitan Hockey Club Inc.*, 427 U.S. 639 (1976) because of an absence of a finding of "willful, bad faith or other such culpable misconduct by the litigant." (Petition, at 6).

The findings of the trial court, amply based on the record and adopted on appeal, do evince precisely such willful conduct, and satisfy the standards of *National Hockey League*. The trial court found a consistent pattern of discovery abuses and violations of court orders, and specifically held that a sanction other than dismissal, in light of the egregiousness of Petitioners' conduct, "would not be effective." (Appendix F to Petition (trial court opinion), at 51-59 & 58 ¶ 30)

The Second Circuit found the trial court's Findings of Fact and Conclusions of Law "well documented," and flatly rejected Motown Beverage's argument that the lower court had abused its discretion in entering the default. (Appendix I to Petition (appellate court opinion), at 72-74)

What Petitioners fail to acknowledge is a separate aspect of the *National Hockey League* decision:

> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.
>
> But here, as in other areas of the law, the most severe spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals [which had vacated the default] remained undisturbed in this case, it might well be that these [defendants] would faithfully comply with all future discovery orders in this

> case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout discovery orders of other district courts.

427 U.S. at 642-43.

B. Circuit Court Decisions Relied Upon

The Petitioners—while not even remotely demonstrating a split in the circuits—also cite to certain decisions of the Second Circuit *itself* (*see* Petition, at 6), and decisions from other Circuits (*id.* at 12-13), and then argue that the decision below did not 'follow' these decisions.

In the first instance, it is a fiction to posit that another appellate court would reach a different decision on these facts. Each determination is highly fact-specific, and Rule 37 grants a trial court broad discretion in deciding upon the appropriate remedy.

Equally fundamentally, Petitioners' arguments based on these cases are simply a rehashing of Petitioners' disagreements with the trial court's findings of fact and conclusions of law, upheld on appeal. The cases cited do not demonstrate any kind of 'conflict' among Circuits, or espouse any principles inconsistent with the approach taken by the Second Circuit.[1]

After repeated, consistent violations of the Federal Rules and court orders, and the consequent entry of default, the Petitioners appealed to the Second Circuit, effectively seeking a *de novo* review of the facts. They are seeking the same opportunity before this Court. This is not an appro-

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[1] The Petition also at times mischaracterizes the decisions below. In citing to other decisions, Petitioners argue that, unlike those cases, there was no court 'order' here that they violated, and the trial court failed to consider lesser sanctions. But this is precisely what the trial court did here: it issued orders, and considered lesser sanctions. *See, e.g.*, trial court decision at ¶¶ 11, 15, 24, 30.

priate request for appellate review, but rather a further example of Petitioners' misuse of process and waste of judicial resources.

Conclusion

For the reasons stated, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

Milton Springut
Counsel of Record
KALOW SPRINGUT & BRESSLER
488 Madison Avenue
New York, New York 10022
(212) 813-1600

Of Counsel

Kenneth L. Bressler
Robert Tilewick
KALOW SPRINGUT & BRESSLER
488 Madison Avenue
New York, New York 10022
(212) 813-1600